Philips (M) Sdn Bhd v Ghazali bin Idris & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D3-22-88 OF 1995
ARIFIN JAKA J
7 NOVEMBER 1998

Civil Procedure *— Summary judgment — Appeal — Whether there are triable issues — Whether doctrine of estoppel applies — Rules of the High Court 1980 O 14*

The defendants had executed a guarantee on 13 February 1990 by which they jointly and severally guaranteed the repayment of any sums of money under a credit facility made available by the plaintiffs to CCD (M) Sdn Bhd ('CCD'). The facility was to enable CCD to purchase goods from and for services rendered by the plaintiffs. The plaintiffs had sued CCD and the guarantors who are the defendants herein vide Kuala Lumpur High Court Suit No D5-22-945 of 1992 ('the first suit'). Later, the plaintiffs had withdrawn the first suit against the other defendants. However, the plaintiffs instituted an action by writ on 22 February 1995 against all the defendants as guarantors under the guarantee executed by the defendants. After the commencement of this action, the plaintiffs took out an application under O 14 of the Rules of the High Court 1980 ('the RHC') for summary judgment for the amount of RM382,558.48 plus interest. The application was heard by the senior assistant registrar ('the SAR') who dismissed the application and hence the plaintiffs appealed. The application was resisted by the defendants by raising two issues — first the doctrine of issue estoppel and secondly there are triable issues. The defendants argued that the judgment in default of appearance against the second defendant in the first suit were set aside and the defendant was granted leave to file his statement of defence. Therefore, the plaintiffs are estopped from saying that the defendants have no defence to the action.

Held, allowing the appeal:

(1) It is an established principle of law that in respect of the doctrine of issue estoppel, the question to be decided is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality. The default judgment was set aside and the defendant was ordered to file his defence. There is no evidence to show or at least to suggest that the court when making that order adjudicated and considered whether the defendants had a good defence. In any event, even if it was considered the second and third defendants herein were not parties to the application to set aside the judgment in default. The doctrine of issue estoppel does not apply on the facts and circumstance of the case (see pp 655G, 656A–B, D–F).

(2) A close scrutiny of the defence reveals that the defendants are denying they had signed the guarantee. However, the defendants

are not alleging that their signatures had been forged or that they had signed the guarantee under a misrepresentation. They are merely denying they ever signed the guarantee on the score that the witnesses did not actually signed as witnesses. The fact still remained that the defendants signed the guarantee which under the law they could not deny as they had failed to show that their signatures were forged (see *Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai* [1997] 1 MLJ 288). The wordings of the guarantee are clear and unambigous. The guarantors are liable to pay any money due to the plaintiffs. The defendants had not adduced evidence to show that there is an issue on the amount due and owing by the defendants to the plaintiff. The liability of the defendants is clearly established on the evidence before this court (see pp 657A–D, 658A–B).

[Bahasa Malaysia summary

Defendan telah menyempurnakan satu jaminan pada 13 Februari 1990 di mana mereka telah secara bersesama dan berasingan menjaminkan pembayaran balik apa-apa jumlah wang di bawah kemudahan kewangan yang disedikan oleh plaintif-plaintif kepada CCD (M) Sdn Bhd ('CCD'). Kemudahan tersebut membolehkan CCD untuk membeli barangan daripada dan untuk perkhidmatan plaintif-plaintif. Plaintif-plaintif telah menyaman CCD dan penjamin-penjamin yang merupakan defendan-defendan di sini melalui Mahkamah Tinggi Kuala Lumpur Guaman No D5–22–945 tahun 1992 ('guaman pertama'). Selepas itu, plaintif-plaintif telah menarik balik guaman pertama terhadap defendan-defendan yang lain tersebut. Bagaimanapun, plaintif-plaintif telah memulakan satu tindakan melalui writ bertarikh 22 Februari 1995 terhadap kesemua defendan-defendan sebagai penjamin-penjamin di bawah jaminan yang disempurnakan oleh defendan-defendan. Setelah bermulanya tindakan ini, plaintif-plaintif telah mengeluarkan satu permohonan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk penghakiman terus bagi jumlah RM382,558.46 bersama faedah. Permohonan tersbeut telah didengar oleh penolong kanan pandaftar ('PKP tersebut') yang telah menolak permohonan tersebut dan justeru itu plaintif-plaintif telah merayu. Permohonan tersebut telah ditentang oleh denfendan-defendan dengan menimbulkan dua persoalan — pertama mengenai doktrin mengenai persoalan estopel dan kedua terdapat persoalan-persoalan yang perlu dibicarakan. Defendan-defendan menghujahkan bahawa penghakiman ingkar kehadiran terhadap defendan kedua di dalam guaman pertama telah dikeptepikan dan defendan telah diberikan kebenaran untuk memfailkan pernyataan pembelaan beliau. Oleh itu, plaintif-plaintif telah diestopkan daripada mengatakan bahawa defendan-defendan tiada pembelaan kepada tindakan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Adalah satu prinsip undang-undang yang mapan berkaitan doktrin mengenai persoalan estopel, persoalan yang perlu diputuskan adalah bukan sama ada terdapat satu penghakiman yang muktamad tetapi sama ada persoalan yang telah diadili telah diselesaikan dengan muktamad. Penghakiman ingkar tersebut telah diketepikan dan defendan telah diperintahkan untuk memfailkan pembelaan beliau. Tiada keterangan untuk menunjukkan atau sekurang-kurangnya mencadangkan bahawa mahkamah apabila membuat perintah yang diadili dan dipertimbangkan sama ada defendan-defendan mempunyai satu pembelaan yang baik. Dalam apa keadaan, walaupun ia dianggap defendan-defendan kedua dan ketiga di sini bukan pihak-pihak kepada permohonan untuk mengenepikan penghakiman ingkar tersebut. Doktrin persoalan estopel tidak terpakai berdasarkan fakta-fakta dan keadaan kes tersebut (lihat ms 655G, 656A–B, D–F).

(2) Penelitian terperinci pembelaan menunjukkan bahawa defendan-defendan menafikan mereka telah menandatangani jaminan tersebut. Namun begitu, defendan-defendan tidak mendakwa bahawa tandatangan mereka telah dipalsukan atau bahawa mereka telah menandatangani jaminan tersebut di bawah satu salah nyata. Mereka hanya menafikan mereka pernah menandatangani jaminan tersebut atas sebab bahawa saksi-saksi tidak sebenarnya menandatangani sebagai saksi-saksi. Hakikatnya masih kekal bahawa defendan-defendan telah menandatangani jaminan tersebut yang di bawah undang-undang mereka tidak boleh menafikan kerana mereka telah gagal untuk menunjukkan bahawa tandatangan mereka telah dipalsukan (lihat *Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai* [1997] 1 MLJ 288). Susunan kata-kata jaminan tersebut adalah nyata dan jelas. Penjamin-penjamin tersebut bertanggungjawab untuk membayar apa-apa wang yang perlu dibayar kepada plaintif-plaintif. Defendan-defendan tidak mengemukakan keterangan untuk menunjukkan bahawa terdapat persoalan berhubung jumlah yang perlu dibayar dan terhutang oleh defendan-defendan kepada plaintif. Liabiliti defendan-defendan jelas dibuktikan atas keterangan yang dihadapkan ke mahkamah ini (lihat ms 657A–D, 658A–B).]

Notes

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778,

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Bank Bumiputra Malaysia Bhd v Technology & Systems Development Corporation and Systems Development (M) Sdn Bhd & Ors [1989] 2 CLJ 987 (refd)
Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai [1997] 1 MLJ 288 (folld)
Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor [1988] 1 MLJ 395 (refd)
PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malayslan Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 8, O 14 r 4(1)
The Supreme Court Practice 1985 Vol 1 para 14/3–4/3

(*Ravi & Associates*) for the plaintiffs.
(*Ranjit Thomas & Kula*) for the defendants.

Arifin Jaka J: The plaintiffs, Phillips Malaysia Sdn Bhd instituted this action by writ on 22 February 1995 against all the defendants as guarantors under a guarantee executed by the defendants on 13 February 1990. The plaintiffs' claim is for RM382,558.48 plus interest. After the commencement of this action, the plaintiffs took out an application under O 14 of the Rules of the High Court 1980 ('the RHC') for summary judgment for the amount claimed. The application was heard by the senior assistant registrar ('the SAR') who dismissed the application. Against that decision, the plaintiffs appealed.

The facts that can be gathered from the pleadings and the affidavits filed by the parties are as follows. The defendants had executed a guarantee on 13 February 1990 by which they jointly and severally guaranteed the repayment of any sums of money under a credit facility made available by the plaintiffs to CCD (M) Sdn Bhd ('CCD'). The facility was to enable CCD to purchase goods from and for services rendered by the plaintiffs. In pursuance of the guarantee the plaintiffs allowed CCD to purchase goods and rendered services on credit.

The plaintiffs had sued CCD and the guarantors who are the defendants herein vide Kuala Lumpur High Court Guaman No D5–22–945 tahun 1992 ('the first suit'). A judgment In default of appearance ('the said judgment') was entered on 6 October 1992 against CCD for the sum of RM310,385.23 with interest at 1.5% per month on the sum of RM293,407.46 from 1 July 1992 to date of judgment and further interest at 8%pa on RM323,986.47 from date of judgment to date of full payment and RM250 costs. The said judgment was amended pursuant to order of court dated 17 November 1993. CCD had applied to set aside the said judgment and was dismissed by the SAR. An appeal against this decision was dismissed by the learned judge in chambers. In the meantime, the plaintiffs had withdrawn the first suit against the other defendants therein who are the defendants in the instant action.

A As at 9 January 1995 a sum of RM382,558.48 inclusive of interest was due from CCD under the said judgment. By letter dated 9 January 1995 the plaintiffs through their solicitors to CCD demanded payment of the said sum of RM382,558.48 being the amount then currently due from CCD to the plaintiffs and enclosing by way of service a copy of the sealed amended judgment. CCD had neither responded to the demand nor made any B payment of the said sum or any part thereof. Consequently, by letter dated 28 January 1995 the plaintiffs through their solicitors to the defendants demanded payment of the said sum of RM382,558.48 together with interests and costs pursuant to the guarantee executed by the defendants on 13 February 1990. The defendants had failed to pay the said sum or any C part thereof. The plaintiffs filed this action on 22 February 1995 to recover the said sum together with interests and costs.

The plaintiffs filed an application under O 14 of the RHC for summary judgment for the amount claimed. The application was resisted by the defendants by raising two issues — first the doctrine of issue estoppel and secondly there are triable issues and therefore summary D judgment should not be given as prayed by the plaintiffs. The first issue raised by the defendants in the affidavit by the third defendant affirmed on 27 November 1995 is that the plaintiffs are estopped from saying that the defendants have no defence to this action in view of the order dated 21 May 1993 in the first suit. It is pertinent at this stage to refer to that order. The order relied on was made pursuant to an application by Ghazali E bin Idris, the second defendant in the first suit ('the said defendant'), who is the first defendant in this present action, to set aside the Perakuan Ketakhadiran and the judgment in default of appearance entered against him dated 30 October 1992. By that order the 'Perakuan Ketakhadiran' and the judgment in default of appearance were set aside and the said defendant F was granted leave to file his statement of defence. Therefore, the defendants contend, issue estoppel applies and the plaintiffs are estopped from saying that the defendants have no defence to the action.

It is an established principle of law that in respect of the doctrine of issue estoppel the question to be decided is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of G with finality (see *Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor* [1988] 1 MLJ 395).

The case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, is referred to by counsels for both parties. In that case the then Supreme Court dealt with the question of cause of action H estoppelas opposed to Issue estoppel. The court held inter alia that; 'The cause of action estoppel arises when rights or liabilities Involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in I a subsequent proceeding.

In the case before me, the default judgment was set aside and the said defendant was ordered to file his defence. There is no evidence to show or

at least to suggest that the court when making that order adjudicated and considered whether the defendants had a good defence. It must be borne in mind that it is trite that a judgment in default of appearance or defence may be set aside by the court under O 13 r 8 of the RHC and if a judgment in default has not been regularly obtained the defendant is entitled to have it set aside ex debitio justitiae (see *Tuan Haji Ahmed Abdul Rahman v Arab Malayslan Finance Bhd* [1996] 1 MLJ 30). However, if the judgment is regularly obtained, in the case of judgment in default of defence, the defendant had to adduce evidence by way of affidavit to show that he has a prima facie defence on the merits and has raised an arguable and triable issue (see *Bank Bumiputra Malaysia Bhd v Technology & Systems Development Corporation and Systems Development (M) Sdn Bhd & Ors* [1989] 2 CLJ 987. The term 'defence on the merit' means a defence which discloses an arguable and triable issue (see *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60).

In the instant case, it not in evidence that the issue whether the said defendent has a defence on the merit was ever considered by the court in the first suit. In any event, even if it was considered the second and third defendants herein were not parties to the application to set aside the judgment in default.

For the reasons stated above, I am of the view that the doctrine of issue estoppel does not apply on the facts and circumstance of this case.

The next issue that has to be considered is whether the defendants had succeeded in satisfying the court that there is a triable issue or question or that there ought to be a trial for other reason.

Under O 14 r 4(1) of the RHC it is provided that a defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the court. In *The Supreme Court Practice 1985* Vol 1 p 137 para 14/3–4/3 it is stated:

> The use of the term or otherwise is not intended to open wide the door for giving leave to a defendant who has no real defence; the primary obligation remains on the defendant to satisfy the court that there is a triable issue or question or that there ought to be a trial for other reason.
>
> Thus, the fact that he has served a defence may be sufficient to enable a defendant to get leave to defend, but not if it is a sham defence served at or soon after the acknowledgment of service: See *Mc Hardy v Stateum* (1890) 24 QBD 504 where the plaintiff successfully applied for judgment under O 14 one month after the defence was served.

In determining whether there are triable issues, it is essential that I have to examine the defence filed by the defendants. The defence can be summarised that the defendants denied they had executed the guarantee and that CCD never ordered the goods and therefore CCD did not owe the plaintiffs the amount claimed, and that the plaintiffs had no cause of action against them. They also alleged that they were released from their liability as guarantor as there was a variation of the limit of the facility without their knowledge and consent.

A close scrutiny of the defence reveals that the defendants are denying they had signed the guarantee. The guarantee is exh A1 in encl 6. A perusal of the guarantee clearly shows that all the defendants signed the guarantee and witnessed by two witnesses, namely, Cheah Kar Wai and Stefanie Anne Sze Tho Mei Yong. However these two witnesses by their affidavits (encl 12 — exh 'COH 7') deposed that when they signed as witnesses the signatures of the guarantors were not there. The defendants relied on this affidavit and contended that under these circumstance the plaintiffs had not proved that the defendants had signed the guarantee. The defendants are not alleging that their signatures had been forged or that they had signed the guarantee under a misrepresentation. They are merely denying they ever signed the guarantee on the score that the witnesses did not actually signed as witnesses. To my mind, the fact still remained that the defendants signed the guarantee which under the law they could not deny as they had failed to show that their signatures were forged (see *Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai* [1997] 1 MLJ 288) and failed to give reasons why their signatures could be vitiated. For these reasons, I find as a fact that the defendants did sign the guarantee.

Having said that, I now consider whether the defendants are liable under the guarantee. The defendants contended that the plaintiff had failed to verify the cause of action against the defendants. The defendants contended that the goods were ordered by CCD (M) Sdn Bhd and not CCD (M) Sdn Bhd and the addresses in the purchase orders and the invoices are different. The short answer to this is that the plaintiffs claim against the defendants as guarantors and the claim is for the amount due and payable to the plaintiffs by the principle borrower under a judgment based on the guarantee. The defendants cannot at this stage challenged the judgment which had been obtained by the plaintiffs against the principle borrower. The liability of the defendants depends on the construction to be placed on the words of the guarantee itself. In construing a document of this kind the court is guided by the principle as stated in *Tan Chong & Sons Motor Company Ltd v Yang Chin Lang* [1967] 1 MLJ 123 where at p 125 Gill J (as he then was) said:

> The principle to be followed in construing a document of this kind, as stated in *Lloyd's v Harper* (1880) Ch D 290 is that, a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances.

The consideration in the guarantee in question is stated clearly thereof as follows:

> In consideration of you having at our request agreed to allow CCD (M) Sdn Bhd credit facility to purchase goods and services from Philips Malaysia Sdn Bhd, we the undersigned hereby undertake jointly and severally to guarantee repayment to you of any money made available under the facility and interest which CCD (M) Sdn Bhd may fail to pay on demand by you of any amount due at any time.

The wordings of the guarantee are clear and unambigous. The guarantors are liable to pay any money due to the plaintiffs. The defendants had not

adduced evidence to show that there is an issue on the amount due and owing by the defendants to the plaintiff. I, therefore rule that the liability of the defendants is clearly established on the evidence before this court.

The last point raised by the defendants is that there is a variation of the limit of their liability under the guarantee. I find there is no merit on this issue as it can be clearly seen that the guarantee does not state any limit of the amount guaranteed. The question of variation of the amount guaranteed does not arise.

On the evidence, I find that the defendants have not satisfied me that there is a triable issue or question or that there ought to be a trial for other reason. The defence is a mere denial and a sham. I am inclined to believe that the defendants are raising the issues, which are in fact no issues at all, for the purpose of delaying the proceedings. On these premises, I have no hesitation to allow the appeal and set aside the order of the SAR. Judgment is hereby entered against the defendants as prayed In the statement of claim. Costs of this appeal and the hearing before the SAR is to be taxed and paid by the defendants to the plaintiffs.

Appeal allowed.

Reported by Benjamin Yong